85- 21

No. 85-____

Office - Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND
BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

H. LADDIE MONTAGUE
ALAN M. SANDALS
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-3000

ARNOLD LEVIN
HOWARD SEDRAN
LEVIN AND FISHBEIN
320 Walnut Street
Philadelphia, PA 19106
215-592-1500

Attorneys for Petitioner Big D Building Supply Corp.

DOUGLAS V. RIGLER*
KAPLAN RUSSIN & VECCHI
1218 Sixteenth Street, NW
Washington, DC 20036
202–638-0060

LINDA HELLER KAMM
MICHAEL FISCHER
FOLEY & LARDNER
1775 Pennsylvania Avenue, NW
Washington, DC 20006
202–862-5300

JOSEPH E. ZDARSKY
KAVINOKY & COOK
120 Delaware Avenue
Buffalo, NY 14202
716–856-9234

Attorneys for Petitioner Square D Company

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

79pp

QUESTION PRESENTED

Does the 1922 Supreme Court decision in *Keogh v. Chicago & N.W. Ry.* today preclude shippers from recovery of damages under the antitrust laws for the conspiratorial acts of a rate bureau and member carriers who knowingly violate the Interstate Commerce Act, related ICC regulations, and their rate bureau agreement?

LIST OF PARTIES

Petitioners Square D Company and Big D Building Supply Corp. are two corporations which shipped commodities between the Province of Ontario, Canada, and the Eastern United States via motor freight carriers belonging to the Niagara Frontier Tariff Bureau. They have brought suit in their individual capacity and on behalf of a class of shippers whose goods were transported by the five defendant motor carrier members of the Niagara Frontier Tariff Bureau. In conformance to Supreme Court Rule 28.1, the following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of Square D Company: Furukawa Circuit Foil Co., Ltd., Square D (Saudi Arabia) Ltd., Square D (S.A.) and Palatine Hills Leasing, Inc.

The defendants in this action are the Niagara Frontier Tariff Bureau ("NFTB"), a motor carrier rate bureau registered with the Interstate Commerce Commission, and five motor carrier members of the Bureau which are engaged in the transportation of motor carrier freight between Canada and the United States. These carriers are Bondy Cartage Limited; Dominion-Consolidated Truck Lines, Limited; ICL International Carriers Limited; Inter-City Truck Lines (Canada), Inc.; and TNT Canada, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	5
Introduction	5
1. The *Keogh* Decision Never Was Intended To Apply To Conspiracies To Avoid A Regulatory Plan	7
2. The 1922 Rationale Employed By The Court In *Keogh* Has Been Discarded	8
3. Application of *Keogh* Contravenes This Court's Holdings That Implied Exemptions To Antitrust Liability Are Strongly Disfavored	11
4. Application Of *Keogh* To Prevent the Recovery Of Damages Effectively Leaves Shippers By Motor Carrier Without A Means of Recompense For Illegal Overcharges	12
5. The Second Circuit's Decision Presents An Important Case of Statutory Interpretation	13
6. The Opinion Of The Second Circuit, If Allowed To Stand, Would Result In An Illogical Discrimination In The Application Of The Antitrust Immunity Through Regulatory Statutes	16
7. The Circuit Court's Conclusion That Shippers May Not Recover Antitrust Damages From Carriers Ostensibly Subject to ICC Regulation Is Incompatible With This Court's Decision In *ICC v. American Trucking Association*	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:	Page
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966)	9, 16
City of Groton v. Connecticut Light & Power, 662 F.2d 921 (2d Cir. 1981)	16
City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978)	16
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	11
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975)	11
Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)	10
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)	10
ICC v. American Trucking Assn., 104 S. Ct. 2458 (1984)	9, 10, 12, 16
Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922)	*passim*
MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983)	16
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	11
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	12
Southern Motor Carriers Rate Conference, Inc. v. United States, 105 S.Ct. 1721 (1985)	14
United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)	11
In re Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305 (7th Cir. 1985)	15, 17
STATUTES:	
The Reed-Bulwinkle Act, 62 Stat. 472 (1948)	2, 14, 15
The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980)	6, 14, 15
The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976)	6, 15
49 U.S.C. § 10706 (1982)	3, 15
49 U.S.C. § 11705 (1982)	13
49 U.S.C. § 11706 (1982)	2, 13
28 U.S.C. § 1254(1) (1982)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, *et al.* v. NFTB, *et al.*

On Petition of Square D Company and Big D Building Supply Corp. for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 9, 1985.

OPINIONS BELOW

The Court of Appeals for the Second Circuit issued its Opinion, reproduced at Appendix pp. 1a-40a, on April 9, 1985. The Order of the Court of Appeals remanding these actions to the District Court in conformance with the Court's Opinion of April 9, 1985 is reproduced at Appendix pp. 41a-42a. The Opinion and Order of the District Court which ordered dismissal of these actions and which gave rise to the appeal is reproduced at Appendix pp. 44a-50a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 9, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

Section 5(b)(9) of the Reed-Bulwinkle Act, 62 Stat. 472 (1948).

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

STATEMENT OF THE CASE

In June 1983, the United States filed a civil complaint against the Niagara Frontier Tariff Bureau ("NFTB") and five motor carrier members charging that they had engaged in a secret price fixing conspiracy beginning at least as early as 1966 and continuing at least into 1981. The Government alleged that the defendants organized an undisclosed "Principals Committee" comprised of senior management officials of the NFTB and certain executives of some of the NFTB member carriers. The Principals Committee was not authorized by the Interstate Commerce Commission to engage in rate-making conduct. Indeed, the existence of the Committee was kept secret from the ICC. The complaint alleged that through the Principals Committee, the defendants and unnamed co-conspirators engaged in motor freight rate fixing and also agreed upon methods by which

to inhibit competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada.

On July 8, 1983, Square D Company filed a complaint under Sections 4 and 16 of the Clayton Act alleging the same violations of the antitrust laws as set forth in the Government's civil complaint and seeking to recover damages for the injuries which it had sustained as a result of these violations. The Square D complaint alleged that the defendants:

a) Set and controlled Niagara Frontier Tariff Bureau rate levels without complying with the notice, publication, public hearing or recordkeeping requirements of the NFTB agreement and Interstate Commerce Commission regulations;

b) Held Principals Committee and other meetings to plan threats, coercion and retaliation against other NFTB member carriers for exercising their right of independent action;[1]

c) Through pressure, coercion, threats of retaliatory rate reductions, taking retaliatory rate reductions, internal NFTB practices, and other means, interfered with, restrained and restricted the right of NFTB member carriers and non-member carriers to make rates independent of the NFTB agreed-upon rates;

---

[1]Independent action is the right of a motor tariff bureau member to make a unilateral tariff filing with the ICC. This right is guaranteed by statute, formerly 49 U.S.C. § 5b(6) (1976), currently codified at 49 U.S.C. § 10706(b)(3)(B)(ii) and, ostensibly, by the NFTB Rate Bureau Agreement on file with the ICC. NFTB Bylaws effective June 1, 1981, Article XVII.

d) Filed tariffs with the ICC in Washington, D.C. that were in furtherance of the conspiracy.

The action was filed by Square D for itself and as a representative of a class of purchasers of freight transport between the United States and Ontario, Canada on the defendant motor carriers. On October 7, 1983, Big D Building Supply Corp. filed a similar complaint. These actions have been consolidated in the United States District Court for the Western District of New York.

Defendants filed a motion before the District Court pursuant to F.R.Civ.P. 12(c) and 12(h)(2), for judgment on the pleadings as to appellants' claim for damages. The sole basis for the motion was an assertion that the holding in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922) precluded the recovery of damages under the antitrust laws. The *Keogh* decision held that rates which had been investigated and approved by the ICC as reasonable were not subject to collateral attack under the antitrust laws even though the rates were the product of joint rate setting activities. The Court's holding in *Keogh*, which immunized rates set in *compliance* with ICC procedures, was held in the instant case to insulate the defendants' activities taken in *violation* of ICC procedures from antitrust damage claims.

As was necessary for purposes of their motion, the defendants agreed that all material allegations of plaintiffs' complaints were to be taken as true and correct. In subsequent oral argument defendants reiterated their admission that for purposes of their motion, the violations plaintiffs allege are "outside the scope of antitrust immunity." Transcript of oral argument before the District Court, reproduced at Appendix p. 56a.

The District Court granted defendants' motion and dismissed plaintiffs' complaint. On appeal to the United States

Court of Appeals for the Second Circuit, the judgment of the District Court was affirmed on the basis that the holding in *Keogh* prevented maintenance of an action to recover collusively established overcharges.[2] This petition, therefore, presents the single legal issue of whether the 1922 *Keogh* decision effectively bars any claim for damages flowing from antitrust violations which, as conceded by the defendants, are outside of any ICC-granted immunity.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Introduction

The *Keogh* decision of 1922 accommodated two competing national policies embodied in different statutory plans. The Sherman Act reflected a Congressional determination that price fixing and coercive acts to prevent others from offering competitive prices were harmful to the nation's economy. However, under the Interstate Commerce Act, joint rate making by surface transportation carriers was subject to government supervision of the jointly proposed rates and opportunity for shippers to be able to oppose ICC approval of unreasonably high rates.

Keogh, a flax manufacturer who shipped goods by rail, complained to the ICC that proposed jointly set rail transport rates were excessive. The ICC suspended the proposed rates, investigated them and heard testimony from Keogh in support of the charge that the contested rates were too high. On the basis of the record generated by the investigation and hearing, the ICC approved the rates. Only then did

---

[2]In their motion, defendants had not sought dismissal of plaintiffs' entire complaint, but had requested relief only with respect to plaintiffs' damage claim. The Court of Appeals reinstated plaintiffs' claim for injunctive relief and granted plaintiffs an opportunity to amend their complaints to state a claim for damages other than the damages precluded by the application of the *Keogh* doctrine.

Keogh launch a collateral attack on the jointly set rates by contending that the joint rate making process constituted price fixing forbidden by the Sherman Act. In 1922 Congress had not addressed the apparent contradiction in statutory direction between the Sherman Act and the Interstate Commerce Act, and it was left to the Court to decide if joint rate making under ICC supervision was immune from antitrust attack. In the *Keogh* decision, the Court refused to permit Keogh to pursue a damage claim under the antitrust laws.

The *Keogh* holding has not been reviewed by this Court since 1922, despite passage in 1948 of the Reed-Bulwinkle Act in which Congress articulated the antitrust immunity which compliance with ICC rate making procedures would confer. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (codified in scattered sections of 49 U.S.C.)[3] also limited the circumstances under which joint rate making activity may qualify for antitrust immunity. Thus, the Court has not reviewed the *Keogh* rationale in light of significant statutory changes in which the Congress made an express grant of antitrust immunity to carriers which comply with the ICC regulatory plan.

Although this Court has held that government-regulated conduct may be exempt from antitrust challenge, it correspondingly has held that any such immunity should be express rather than implied and that exempted conduct must be in compliance with the regulatory plan. Despite its repeated applications of this fundamental rule to a number

[3]See also the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified in scattered sections of 45 U.S.C. and 49 U.S.C.), which substantially lessened ICC regulation of railroad rates in order to increase competition in surface transport of commodities.

of regulated industries, however, the Court has not applied the rule directly to surface carriers subject to ICC regulation. If the Second Circuit's opinion is allowed to stand, there will be a significant discrepancy between this Court's consistent conditioning of antitrust immunity in a regulated industry context to compliance with a statutory plan and the result rendered by the lower court in this action. Contrary to this Court's policy determinations, motor carrier defendants who deliberately circumvent and frustrate a statutory plan of regulation will be able to retain overcharges obtained by such violations.[4]

1. The Keogh Decision Never Was Intended To Apply To Conspiracies To Avoid A Regulatory Plan

In the instant case, the *Keogh* doctrine is being used to shield from redress activities which were not even presented to this Court in the *Keogh* decision. First, the *Keogh* controversy concerned published rate agreements which were submitted to the ICC for review. The rates were approved after investigation and hearing. When it decided *Keogh*, the Court was not considering a situation in which the ICC rate oversight process was being subverted.

Second, the defendants herein also claim immunity for coercive activities including those undertaken to *prevent* other carriers from filing independent rates. Essentially, they assert that the *Keogh* decision protects secret conspiracies to *suppress* rate filings. In such cases, the ICC never has a chance to review, let alone approve, rate proposals which are prevented through coercion from being filed. It is

[4]As discussed in point 4, *infra*, there is no effective remedy which the victimized shippers can obtain at the ICC, so that under the lower court's reading of *Keogh*, the defendants are assured that they profit by cheating on the ICC procedures. It is doubtful that this was the intended result of the *Keogh* decision.

unlikely that even in 1922 the Court intended to immunize this type of anticompetitive activity as a necessary adjunct to the success of federal regulation of surface transportation rates.

2. The 1922 Rationale Employed by the Court in Keogh Has Been Discarded

None of the four reasons given in the *Keogh* decision in support of what appeared a logical result in light of the fact situation presented and the then existing statutory framework has any current validity. Rather, there have been specific disavowals of the elements of the 1922 rationale by this Court. The continuing rote application of a decision whose rational has been discarded deserves the review of this Court. This is especially true when application of a rejected doctrine deprives victims of a hard-core price fixing scheme, unauthorized by any regulatory agency, of any effective means of redress.[5]

What remains of the *Keogh* decision is a hollow shell, which serves only as a device to enable those who violate *both* the ICC statutes and the antitrust laws to retain illegal overcharges. Perhaps this explains why the Court of Appeals stated that ". . . much of the reasoning of *Keogh* seems outdated. . ." (Appendix, p. 3a) and that the arguments advanced in support of the decision ". . . do not seem so compelling today as they did in 1922." (Appendix, p. 9a). It concluded, however, that *Keogh's "language* has not been overruled," and if it is to be overruled, "that task is for the Supreme Court." (Appendix, p. 3a). (emphasis added.)

A fair reading of the Opinion of the Second Circuit Court of Appeals, authored by Judge Friendly and joined by Chief

[5]The conduct in question not only was not submitted to the ICC for review and approval, but it could not have been approved in any event since the conduct is forbidden by statute and regulation.

Judge Feinberg and Judge Kaufman, indicates a belief that *Keogh* is bad law and should be overruled. Unmistakeably, the Circuit Court concluded that none of the reasons advanced in support of the original *Keogh* ruling is applicable today. The Court of Appeals emphasized that "the case for reaching a contrary conclusion today to that reached by Justice Brandeis is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates." (Appendix, p. 15a).

The Circuit Court's comments with respect to the invalidity of the four reasons which in 1922 seemed to justify the result in *Keogh* are instructive.

a) The Second Circuit found that the fear that recovery of antitrust damages would operate "like a rebate" to produce discrimination among shippers ignored the fact that damages do not represent an under-the-table payment but rather a court determination that the shipper has suffered antitrust injury. The Circuit Court pointed out that adversion to a rebate as a justification for *Keogh's* application is inconsistent with this Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966) in which the Court expressly rejected this concern as a reason for refusing damages. *Accord, ICC v. American Trucking Assn.*, 104 S. Ct. 2458 (1984). The Court of Appeals also noted that the argument does not apply to class actions such as the pending two actions.

b) The requirement that an injured shipper prove its damages by showing that a hypothetically lower rate which the carriers would have charged in the absence of the antitrust violation conformed to the requirements of the Interstate Commerce Act is, according to the Court of Appeals, "even less compelling." The Second Circuit correctly points

out that any such concern has been overcome in many later decisions of this Court. *See ICC v. American Trucking Assn.*, 104 S. Ct. 2458, 2463, n.5 (1984). Moreover, antitrust damages based on comparisons between the illegally fixed rate and the competitive rate which would have prevailed have been upheld in regulated industries which do not involve rail or motor freight transportation. There is no greater or lesser degree of difficulty for a plaintiff to meet its burden of proving damages for excessive motor freight transportation costs than for other sales or service overcharges.

c) Justice Brandeis' assertion in *Keogh* that shippers would have difficulty in proving that they were entitled to damages based on the lower rates which would have prevailed absent the conspiracy because they may have passed on the benefit of the lower rates to their customers is, according to the Court of Appeals, "still less persuasive in view of later developments." The Circuit Court was referring, *inter alia*, to this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) which effectively eliminated the pass-on defense.[6]

d) In *Keogh*, Justice Brandeis had asserted that a rate is not necessarily illegal even though it is the result of a conspiracy in restraint of trade because the legality of rates is determined by the Interstate Commerce Act. 260 U.S. at 162. The Circuit Court disagreed with this assertion. It observed that the ICC recognizes a zone of reasonableness in shipping rates. Where rates within this zone are increased as a result of a conspiracy, a shipper should be allowed to recover the excess of a reasonable rate over a still lower reasonable rate that would have prevailed absent the conspiracy.

[6]The Court of Appeals also referred to this Court's decision in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) in which this Court described the *Keogh* decision as mere "dictum" to which no general significance was to be ascribed "where the plaintiff is free to prove that he has been charged an illegally high price." 392 U.S. at 491, n.8.

3. Application of Keogh Contravenes This Court's Holdings That Implied Exemptions to Antitrust Liability Are Strongly Disfavored

Even in 1922 *Keogh* stood for the proposition that the presence of the ICC regulatory plan gave rise to an *implied* exemption to antitrust liability under the Sherman Act. Until 1948, with the passage of the Reed-Bulwinkle Act, the Interstate Commerce Act did not deal with the question of when and under what circumstances limited exemption from the antitrust laws could be obtained by carriers in compliance with the Act. During the 60 years since the *Keogh* decision was announced, however, this Court repeatedly has held that implied exemptions to antitrust liability—such as the *Keogh* doctrine necessarily represents—are "strongly disfavored." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973).[7] The Court has stated that implied immunity is recognized only as necessary to avoid frustrating regulatory policy as "where there is a 'plain repugnancy between the antitrust and regulatory provisions,'" *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. at 350-51). Even in cases of plain repugnancy, the immunity is recognized only "'if necessary to make the [statutory scheme] work, and even then only to the minimum extent necessary.'" *Gordon v. New York Stock Exchange*, 422 U.S. at 683

[7]"[O]ur cases have repeatedly established that there is a heavy presumption against implicit exemptions. . . ." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975).

(quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

Judge Friendly correctly discerned that there would be no repugnancy between the application of the antitrust laws to carriers which violate the regulatory plan and the proper operation of that plan. That conclusion was reaffirmed in the Court's holding in last term's *ICC v. American Trucking Assn.*, 104 S. Ct. 2458 (1984), in which the Court recognized that antitrust damage actions can be maintained consistent with and complementary to the ICC regulatory plan.

4. Application of Keogh To Prevent The Recovery Of Damages Effectively Leaves Shippers By Motor Carrier Without A Means of Recompense For Illegal Overcharges

As the Second Circuit noted and as recognized by this Court in *ICC v. American Trucking Assn.*, only a minute percentage of tariffs filed with the ICC are investigated at all. The sheer volume of filings makes investigation of the vast majority of tariffs impossible. In the recent *ATA* decision, *supra*, the Court found that the ICC reviews "only a random sampling of tariff filings, and tariffs with obvious defects inevitably are permitted to go into effect." *ATA*, 104 S.Ct. at 2463. For example, the ICC reported that for the year 1983, there were only 188 examinations conducted and 11 suspensions ordered with respect to more than 1,200,000 filings.

Even the original *Keogh* doctrine was grounded upon the assumption that the ICC was able to make an effective determination as to the reasonableness of a tariff filing. That assumption has not applied for many years. In *ATA*, this Court noted ". . . the [Interstate Commerce] Commission maintains that its penalty authority is too weak to guarantee compliance with [rate] bureau agreements." *ATA*, 104

S.Ct. at 2467. Upholding *Keogh* today would represent a nonsensical form of public policy. It would permit carriers to bilk shippers on the pretense that overcharges are prevented by an effective regulatory plan even though it is evident that the regulatory plan has been circumvented. The miscreant carriers should not be allowed to hide behind the mere existence of a regulatory plan when they deliberately set out to frustrate that plan.

Additionally, the Court should note that even if a shipper were to seek recovery of overcharges through application to the ICC pursuant to 49 U.S.C. § 11705 (1982), any recovery rights are limited by the two-year statute of limitations imposed by 49 U.S.C. § 11706 (1982). Where defendants successfully conceal their illegal activities, even the theoretical possibility of recovering through an ICC proceeding is lost.

The Niagara Frontier Tariff Bureau violations involved hundreds of tariff filings and supression of countless independent tariff filings by would-be competitors. The ICC with its limited resources and statutory impediments simply cannot extend relief in cases of massive undercover conspiracies such as the conspiracy presented herein. If *Keogh* is read as a bar to antitrust damages even for unauthorized rate fixing, then there is no way for victims of the conspiracy to obtain recompense.

5. The Second Circuit's Decision Presents An Important Case of Statutory Interpretation

Despite Judge Friendly's careful analysis of the legislative history of the Reed-Bulwinkle Act, the conclusion reached by the Court cannot be accommodated with the express language of Section 5b(9) of the Act. Section 5b(9) provides:

> Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.[8]

The Circuit Court's reading of Section 5b is inconsistent with the statute's clear statement that antitrust immunity extends solely to agreements approved by the ICC and carried out in conformity with terms and conditions prescribed by the Commission. Any other interpretation renders Section 5b(9) a statutory nullity. The Circuit Court's interpretation conflicts with the general rule that legislative history does not overcome clear and express statutory language and with this Court's repeated admonitions that implied antitrust immunity is disfavored.[9]

The United States apparently agrees with petitioners' reading of the Reed-Bulwinkle Act. In its complaint against the Niagara Frontier Tariff Bureau, the Government specifically alleged:

> Relief from the antitrust laws under the Reed-Bul-

[8]49 U.S.C. § 5b(9) (1976 ed.), 62 Stat. 472 (1948). Because of the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, this provision does not appear in the 1982 edition of the United States Code.

[9]In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721, 1734 (1985), Justice Stevens, writing in dissent, but on an uncontested point, noted that Congress did make a policy decision with respect to price fixing in the transportation industry and that that policy choice was effectuated in the Reed-Bulwinkle Act.

> winkle Act is strictly limited to the terms of the approved agreement, and it does not extend to conduct that the ICC is not empowered to authorize, or if empowered, has not authorized.

Any lingering doubts as to whether Congress intended compliance with the ICC regulatory procedures to be a condition of antitrust immunity were resolved by the passage of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793. The Court of Appeals agreed that Section 14 of the Act, 49 U.S.C. § 10706, limited the scope of available antitrust immunity. (Appendix, p. 27a). It held that in cases involving anticompetitive activities which occur after October 1, 1980—the effective date of the Motor Carrier Act of 1980—the change effected by that statute will have to be taken into account. (Appendix, p. 17a).[10]

Petitioners also agree that the effect of the Motor Carrier Act of 1980 must be taken into account in determining whether the *Keogh* doctrine has been revised by the Congress. As is clear from its opinion, however, the Circuit Court believes that the issue of *Keogh's* current validity should be addressed by the Supreme Court, and that irrespective of the Circuit Court's doubts as to *Keogh's* applicability, lower courts should hesitate to announce the demise of even long rejected language of prior Supreme Court decisions.[11]

[10]The Court of Appeals for the Seventh Circuit appears to disagree that recent deregulation statutes such as the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, have permitted injured shippers to sue for damages under the antitrust laws. See *In re Wheat Rail Freight Antitrust Litigation*, 759 F.2d 1305 (7th Cir., 1985).

[11]Judge Friendly noted that petitioners contended that antitrust immunity was limited by Congress with the passage of the Reed-Bulwinkle Act in 1948. Petitioners adhere to their position that the Motor Carrier Act of 1980 merely reconfirmed that the *quid pro quo* for immunity which Congress legislated in 1948 is compliance with the regulatory procedures.

6. The Opinion Of The Second Circuit, If Allowed To Stand, Would Result In An Illogical Discrimination In The Application Of The Antitrust Immunity Through Regulatory Statutes

Although the Circuit Court correctly observed that there are differences in the regulatory plan encompassed by the Shipping Act of 1916 and the Interstate Commerce Act, these differences do not justify permitting shippers by ocean freight to recover antitrust damages while denying such recovery to shippers by motor carrier freight. *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213 (1966). Likewise, purchasers of services or commodities in other regulated industries, such as wholesale electric power, *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), and communications, *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983) have been accorded the right to sue for compensatory damages under the antitrust laws. The underlying rationale of *Keogh*, if it were valid, should apply equally in these regulated industries. Instead, it now appears that shippers by motor transport or rail transport are singled out in being denied the opportunity to recover for overcharges occasioned by deliberate violations of a regulatory plan.

7. The Circuit Court's Conclusion That Under No Circumstances May Shippers Recover Antitrust Damages From Carriers Ostensibly Subject To ICC Regulation Is Incompatible With This Court's Decision In ICC v. American Trucking Association

The *Keogh* doctrine is thoroughly incompatible with the position taken by all nine justices in last term's *ICC v. American Trucking Assn.* decision, 104 S. Ct. 2458 (1984). Both the majority and the minority were in agreement that

it is possible for shippers who are injured by violations of ICC regulations to obtain damages under the antitrust laws. A major issue which divided the Court in that decision was whether the prospect of such damages, when coupled with additional reparations available under the MCA's recent amendments to the Interstate Commerce Act, suggested limitations on the remedy which the ICC might impose for regulatory violations.

It is correct that the antitrust damages which were contemplated in *ATA* would be those available after a decision of the ICC disapproving filed rates. This does not overcome the fact that *Keogh* is claimed to shield defendants from payments of *any* antitrust damages irrespective of whether the rates are found to be defective or, in the instant case, set in circumvention of the ICC's own rules.[12]

CONCLUSION

In sum, it may be said of the *Keogh* doctrine:

1. That its continued application would present a significant injustice affecting the national economy since it permits carriers to utilize the mere existence of a regulatory plan they are circumventing to accumulate excessive profits at the expense of shippers.

2. That *Keogh* is inconsistent with the Court's repeated admonition that implied immunity from the antitrust laws is disfavored.

3. That the doctrine is discriminatory in a significant economic sense because this Court has held in the context of

---

[12]In *Wheat Rail Freight*, 759 F.2d at 1316, the Court of Appeals for the Seventh Circuit recently decided that the *Keogh* doctrine precluded recovery of antitrust damages even as to rates which were disapproved by the ICC.

other regulated industries that antitrust immunity from damage actions does not extend to activities which frustrate the regulatory plan. There is nothing so difficult in ICC regulation of surface transportation as to call for application of a different standard.

4. The 1922 *Keogh* doctrine is directly inconsistent with the language of the Interstate Commerce Act as amended in 1948 and 1980.

5. The underlying rationale of the doctrine has been rejected by this Court.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

H. LADDIE MONTAGUE
ALAN M. SANDALS
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215–875-3000

ARNOLD LEVIN
HOWARD SEDRAN
LEVIN AND FISHBEIN
320 Walnut Street
Philadelphia, PA 19106
215–592-1500

Attorneys for Petitioner
Big D Building
Supply Corp.

DOUGLAS V. RIGLER*
KAPLAN RUSSIN &
VECCHI
1218 Sixteenth St., NW
Washington, DC 20036
202–638-0060

LINDA HELLER KAMM
MICHAEL FISCHER
FOLEY & LARDNER
1775 Pennsylvania Ave.,
NW
Washington, DC 20006
202–862-5300

JOSEPH E. ZDARSKY
KAVINOKY & COOK
120 Delaware Avenue
Buffalo, NY 14202
716–856-9234

Attorneys for Petitioner
Square D Company

**Counsel of Record*

DATE: July 5, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 669 — August Term, 1984

(Argued: January 14, 1985 Decided: April 9, 1985)

Docket No. 84-7831

SQUARE D COMPANY and BIG D BUILDING SUPPLY CORP.,
Plaintiff-Appellants,

—against—

NIAGARA FRONTIER TARIFF BUREAU, INC.; BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES, LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA), INC.; TNT CANADA, INC.,
Defendant-Appellees.

Before:

FEINBERG, *Chief Judge*, FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeal from an order of the District Court for the Western District of New York, John T. Curtin, *Chief Judge*, 596 F. Supp. 153 (1984), dismissing, for failure to state a claim upon which relief can be granted, appellants' complaints under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, seeking damages and injunctive relief on the basis of allegations that defendants fixed motor carrier rates between the United States and Canada and engaged in other anticompetitive activities in violation of

the antitrust laws. Affirmed in part, reversed in part and remanded.

Douglas V. Rigler, Washington, D.C. (Linda H. Kamm, Michael Fischer, Foley & Lardner, Washington, D.C.; Joseph E. Zdarsky, Kavinoky & Cook, Buffalo, N.Y.), *for Appellant, Square D. Company*, (H. Laddie Montague, Alan M. Sandals, Berger & Montague, P.C., Philadelphia, Pa.; Arnold Levin, Howard Sedran, Levin and Fishbein, Philadelphia, Pa.), *for Appellant, Big D Building Supply Corp.*

Donald L. Flexner, Washington, D.C. (William Randolph Smith, Lisa B. Rovin, Crowell & Moring, Washington, D.C.), *for Appellee, Dominion-Consolidated Truck Lines, Limited* (Lester M. Bridgeman, Louis E. Emery, Bridgeman & Urbancyzk, Washington, D.C.), *for Appellee, Inter-City Truck Lines, (Canada) Inc.*, (Bryce Rea, Jr., Donald E. Cross, Rea, Cross & Auchincloss, Washington, D.C.; Sanford M. Litvack, Clark E. Walter, Donovan, Leisure, Newton & Irvine, New York, N.Y.), *for Appellee, Niagara Frontier Bureau, Inc.* (Peter A. Greene, Charles L. Freed, Thompson, Hine & Flory, Washington, D.C.), *for Appellee, ICL International Carriers Limited* (John W. Bryant, Eames, Wilcock, Mastej & Bryant, Detroit, Michigan), *for Appellee, Bondy Cartage Limited* (Peter D. Standish, Joel B. Harris, Weil, Gotshal & Manges, New York, New York), *for Appellee, TNT Canada, Inc.*

FRIENDLY, *Circuit Judge*:

This is an appeal from an order of the District Court for the Western District of New York, *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153 (1984), which dismissed appellants' complaints under §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, for failure to state a claim on which relief can be granted. The principal issue is whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), has been overruled so far as its language extends to rates filed with but not investigated and approved by the Interstate Commerce Commission ("ICC"), or, failing that, whether the reasoning underlying that language is so much in conflict with later developments that an inferior court should disregard it. While agreeing with appellants that much of the reasoning of *Keogh* seems outdated, we hold that its language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court. We therefore affirm the district court's principal ruling. However, we also hold that appellants' request for injunctive relief was prematurely dismissed and that appellants should be allowed to replead their damages claims, if they so choose and properly can, to allege injury they have suffered as a consequence of acts of the defendants other than the fixing of rates.

The case before us is a consolidation of two separately filed suits. Both appellants, who were plaintiffs below, are corporations that purchase from the defendants freight transport by motor carrier between the United States and Canada. Appellee Niagara Frontier Tariff Bureau, Inc. ("NFTB") is a rate bureau whose permissible activities are described in an agreement filed with and approved by the ICC. *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955). The

other appellees are Canadian motor carriers engaged in the transportation of freight between the United States and Canada. Both complaints were brought on behalf of appellants individually and as representatives of a class comprised of all other persons and businesses who purchased from defendants freight transport between the United States and the Province of Ontario, Canada.

The complaints alleged substantially as follows:[1] Each of the motor carrier appellees was a party to the collective ratemaking agreement approved by the ICC for the NFTB, which authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada through authorized committees if the motor carriers adhered to the procedures set forth in the agreement and in ICC regulations. In accordance with the requirements of the Reed-Bulwinkle Act, 49 U.S.C. § 10706(b)(2)(B)(ii) (as amended), the rate bureau agreement preserved the right of each carrier to take independent action. The complaints alleged that at least as early as 1966 and continuing at least into 1981, appellees engaged in a conspiracy "to fix, raise and maintain prices and to inhibit or eliminate competition for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement and by otherwise engaging in conduct that either was not or could not be approved by the ICC." More specifically, it was alleged that the appellees established a "Principals Committee" composed of the senior management officials

[1] Appellants' allegations are similar in many respects to those made in a civil antitrust action seeking injunctive relief later filed by the United States. A consent decree terminating that suit was entered on June 26, 1984. *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. June 26, 1984).

of the NFTB carriers that had authority to operate outside the Province of Ontario. Although this Committee did not have ICC authorization or approval to engage in rate-making, the appellants alleged that, through the Committee, appellees "engaged in the joint setting of rates and related policies and also agreed upon methods by which to inhibit competition for the transportation of freight by motor carrier between the United States and the province of Ontario, Canada;" set and controlled NFTB rate levels without complying with the notice, publication, public hearing or record keeping requirements of ICC regulations; planned "threats, coercion and retaliation" against NFTB member carriers for exercising the right of independent action and carried out such threats; and filed tariffs with the ICC in furtherance of the conspiracy. As a result of the conspiracy, appellants alleged, rates for the transportation of freight by motor carrier between the United States and Ontario were fixed at artificial and non-competitive levels, competition between and among the appellee motor carriers was restrained, competition generally in trade and commerce in the transportation of freight by motor service between the United States and Canada was suppressed, and purchasers of freight transport between the United States and Ontario were deprived of free and open competition. The injury suffered was alleged by Square D to be that shippers "have not been able to purchase transportation at rates determined by free and open competition and have been injured in their business and property in that they have paid more for motor freight transport between the United States and the Province of Ontario, Canada than they would have paid in a freely competitive market." Big D alleged substantially the same injury, although this was phrased in slightly different language. Appellants sought damages and injunctive relief.

Appellees moved, pursuant to F.R. Civ. P. 12(c) and 12(h)(2), for judgment on the pleadings as to appellants' claim for damages on the basis of *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Appellants contended that *Keogh* had been overruled by the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948), (current version at 49 U.S.C. § 10706), and also by the Supreme Court's decisions in *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966) and *ICC* v. *American Trucking Ass'n*, 104 S. Ct. 2458 (1984). Disagreeing with this and going beyond the terms of the motion, Chief Judge Curtin did not limit his holding to the damages claims, and dismissed the complaints in their entirety. This appeal followed.

The Keogh opinion

In *Keogh*, a shipper of excelsior and flax tow brought an action under the Sherman Act alleging that rail carriers had restrained competition by combining to fix rates. The challenged rates had been duly filed by the carriers with the ICC and had been attacked there by shippers. The ICC suspended the tariffs pending investigation, but approved the new rates after extensive hearings in which Keogh participated; the challenged rates had not been made effective until after they had been so approved. The Supreme Court held that while the Interstate Commerce Act ("ICA") does not immunize regulated carriers from antitrust liability in Government proceedings, a private shipper may not recover treble-damages because he lost the benefit of lower rates which he would have enjoyed but for the conspiracy. 260 U.S. at 161-62. Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said broadly that shippers could not re-

cover treble-damages for overcharges whenever tariffs have been filed. *Id.* at 163.

Justice Brandeis advanced four reasons for this result. The first, and most important, turns on the existence of a remedy in the ICA respecting rates. He began by stating that

> [a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce.

Id. at 162. He pointed out that under § 8 of the latter act, 49 U.S.C. § 8 (current version at 49 U.S.C. § 11705 (b)), the exaction of any rate that is illegal under the ICA makes the carrier liable to the person injured thereby for the full amount of damages together with a reasonable attorney's fee, recoverable either by complaint before the ICC or in an action in a federal court; thus if the conspiracy complained of in *Keogh* had resulted in rates which the ICC "found to be illegal because unreasonably high, or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings." *Id.* Justice Brandeis then propounded a rhetorical question:

> Can it be that Congress intended to provide the shipper, from whom illegal rates have been exacted, with an additional remedy under the Anti-Trust Act? And if no remedy under the Anti-Trust Law is given where the injury results from the fixing of rates which are illegal, because too high or discriminatory, may it be assumed that Congress intended to give such a remedy where, as here, the rates complained of have been found by the Commission to be

> legal and while in force had to be collected by the carrier?

Id. (citation omitted).

Justice Brandeis next developed a second, closely related argument. After reciting § 7 of the Sherman Act, which gives a right of action to one who has been injured in his business or property," he declared that

> [i]njury implies violation of a legal right. The legal rights of shipper as against carrier are measured by the published tariff. Unless and until suspended or set aside, this rate is made. for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. This "stringent rule" was thought necessary "because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated": if a shipper were allowed to recover under § 7 of the Sherman Act "for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." *Id.* That each shipper might bring a similar action under § 7 failed to answer this concern, since "[u]niform treatment would not result, even if all sued. unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief." *Id.*

Third, Justice Brandeis thought "[t]hat the character of the issues involved raises another obstacle to the maintenance of the action." The antitrust plaintiff could not prevail simply by proving "that some carrier would,

but for the illegal conspiracy, have maintained a rate lower than that published;" he also would have to prove "that the hypothetical lower rate would have conformed to the requirements of the Act to Regulate Commerce." *Id.* at 163-64. This was a question that must be determined by the ICC, at least in the first instance. Justice Brandeis dismissed the suggestion that this difficulty could be met by a court's suspending its proceeding pending reference to the ICC, saying that "by no conceivable proceeding could the question whether a hypothetical lower rate would under conceivable conditions have been discriminatory, be submitted to the Commission for determination." *Id.* at 164.

Fourth and finally, Justice Brandeis found the plaintiff's damages to be purely speculative since all shippers of excelsior and tow were charged the same rates; hence, "[t]he benefit [of lower rates] might have gone to his customers, or conceivably, to the ultimate consumer." *Id.* at 164-65.

Evaluation of the Keogh opinion in the light of subsequent developments

Although the *Keogh* opinion has the "relentless quality" characteristic of Justice Brandeis,[2] many of his arguments do not seem so compelling today as they did in 1922. Passing the first argument for the moment and turning to the second, the fear that recovery of antitrust damages would operate "like a rebate" to produce dis-

[2] Friendly, *Mr. Justice Brandeis: The Quest for Reason*, 108 U. Pa. L. Rev. 985, 986 (1960), *reprinted in* Friendly, Benchmarks 291, 294 (1967). *See also* Professor Frankfurter's remark that Justice Brandeis' opinions "march step by step towards demonstration, with all the auxiliary reinforcement of detailed proof." Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 Harv. L. Rev. 33, 104 (1931).

crimination among shippers ignores the difference between a carrier's passing money under the table to a favored shipper and a court's deciding that a shipper had suffered antitrust injury. *See* Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 Tex. L. Rev. 751, 760 n.26 (1979). Such a distinction was recognized by the Court in the context of the Shipping Act in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), where the Court held:

> We believe that Congress was concerned with assuring equality of treatment by the [carriers], not with equality of treatment by juries in collateral proceedings. There is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others.

Id. at 219 n.3. The argument that antitrust damages create discrimination contrary to the goals of the ICA is also inconsistent with the Court's recent holding in *I.C.C.* v. *American Trucking Ass'n*, 104 S. Ct. 2458, 2462 (1984) ("*ATA*") that

> [w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow.

Id. at 2462. Furthermore, the argument is scarcely applicable to class actions like these, a means of avoiding Justice Brandeis' concerns that was unavailable in actions at law in 1922. *See In re Wheat Rail Freight Rate Antitrust Litig.*, 579 F. Supp. 517, 535 (N.D. Ill. 1984);

F.R. Civ. P. 23, Notes of Advisory Committee; Wright, Federal Courts § 72 at 470-72 (4th ed. 1983).

Justice Brandeis' third reason, that an antitrust action would require the carrier to prove that a hypothetical lower rate conformed to the requirements of the ICA, seems even less compelling. The process in which the ICC would have to engage if a court requested it to determine whether lower rates produced by competition would be reasonable and non-discriminatory does not differ in essence from that which it must undertake in a reparations case, since damages under § 11705(b)(3) of the ICA are limited to the extent to which a tariff was unreasonable or discriminatory, *see ATA*, *supra*, 104 S. Ct. at 2463 n.5 (citing *Boren-Stewart Co.* v. *Atchison, T. & S.F. Ry.*, 196 I.C.C. 120, 125-26 (1933); *Spencer Plant Foods, Inc.* v. *Atlantic C.L.R.R.*, 302 I.C.C. 799, 800 (1958)). To the extent Justice Brandeis was concerned about the unprecedented nature of a proceeding in which the ICC answered only the question whether a particular lower rate would have been reasonable and non-discriminatory without issuing a final order of its own, a concern consistent with his aversion to advisory opinions and declaratory judgments, *see, e.g.*, *Willing* v. *Chicago Auditorium Ass'n*, 277 U.S. 274, 288-90 (1928), this concern has been overcome in the many later cases in which the Supreme Court has directed the suspension of judicial proceedings pending the referral of similar issues to the ICC. *See, e.g., United States* v. *Western Pac. R.R.* 352 U.S. 59, 62-70 (1956) (construction and reasonableness of tariff referred to ICC in Tucker Act claim); *Southwestern Sugar & Molasses Co.* v. *River Terminal Corp.*, 360 U.S. 411, 420-22 (1959) (validity of contract clause referred to ICC in libel action); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-06 (1960) (construction and reasonableness of tariff

referred to ICC in action under ICA); *see also United States* v. *Associated Transp., Inc.*, 505 F.2d 366, 369 (D.C. Cir. 1974) (in exercising its exclusive jurisdiction to award reparations under 49 U.S.C. § 304a(5), court must allow ICC to determine what would have been the "just and reasonable" rate); *cf. Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 496-99 (1958) (legality of dual-rate system referred to Federal Maritime Board to pass on initially). *See generally* 4 Davis, Administrative Law Treatise, ch. 22 (2d ed. 1984).

Justice Brandeis' fourth reason, that "no court or jury could say that, if the rate had been lower, [the shipper] would have enjoyed the difference" since the benefit "might have gone to his customers," 260 U.S. at 165, is still less persuasive in view of later developments. Justice Brandeis himself was to hold in a suit alleging that unreasonably high rates were charged under the ICA that the possibility that a plaintiff had recouped overcharges from his customers was irrelevant in assessing damages. *Adams* v. *Mills*, 286 U.S. 397, 406-08 (1932); *see also Southern Pac. Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, J.). The Supreme Court has also rejected the argument that a plaintiff cannot recover damages it was able to pass on to its customers in the antitrust context. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 487-94 (1968); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-26 (1977). Indeed, in *Hanover Shoe*, the defendant relied on *Keogh* for its argument that plaintiff could not recover any damages; the Court labeled the damages argument made in *Keogh* "dictum" since, in the Court's view, the shipper there was held to have no cause of action under the antitrust laws "[b]ecause the rates had been approved

as reasonable after a proceeding before the Interstate Commerce Commission . . . ." 392 U.S. at 491 n.8. The Court then went on to say, "[w]e ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Id.*

Even the first reason expressed for the result in *Keogh* no longer seems so self-evident as Justice Brandeis thought. Why is a rate "not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act?" Justice Brandeis had recognized in the preceding paragraph of his opinion that a combination of carriers "to fix reasonable and non-discriminatory rates may be illegal." 260 U.S. at 161-162 (citing *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States* v. *Joint-Traffic Ass'n*, 171 U.S. 505 (1898)). Moreover, it has long been recognized that "[a] zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935). Why then should the shipper's ability to recover the excess of an unreasonable over a reasonable rate under the ICA preclude him from recovering the excess of a reasonable (and *a fortiori* an unreasonable) rate over the lower but still reasonable rate that would have prevailed under free competition? Since *Keogh*, the Supreme Court has held that implied exemptions to antitrust liability are "strongly disfavored." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963). The Court has subsequently found that activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity. *See, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341,

357-60 (1963) (no exception found for rules subject to SEC disapproval promulgated by exchanges). Indeed, the Court has reached this result even where the agency is empowered to grant a remedy or agency approval has actually been obtained, and notwithstanding the fact that the agency considers effects on competition under the statutory scheme. *See, e.g., United States* v. *Philadelphia Nat'l Bank, supra*, 374 U.S. at 351-52 (approval of bank merger by Comptroller under Bank Merger Act does not impliedly exempt parties from antitrust laws); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-75 (1973) (available remedy before Federal Power Commission for refusal to sell power does not preclude remedy under antitrust laws).[3] In other words, it seems quite possible

[3] The companion cases of *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), and *United States* v. *NASD*, 422 U.S. 694 (1975), may be read to suggest a more stringent rule, namely, that merely entrusting an agency with authority over challenged activity requires exempting that activity from antitrust liability to avoid subjecting regulated entities to "duplicative and inconsistent standards." 422 U.S. at 735. However, there need be no "duplicative and inconsistent standards" in the context of rates for transport inasmuch as the ICC's conclusion that a rate is within the "zone of reasonableness" and the antitrust court's conclusion that the rates were unlawfully fixed at too high a price within this range do not conflict. Moreover, these decisions appear to require that the challenged practice have obtained some kind of stamp of approval from the agency through the agency's active exercise of —or deliberate choice not to exercise—its regulatory authority. *See Gordon*, 422 U.S. at 668-82, 689-91; *NASD*, 422 U.S. at 728, 730-35. Only a very small percentage of tariffs filed with the ICC are investigated because the sheer volume of filings makes investigation of the vast majority impossible. *Cf. ATA, supra*, 104 S. Ct. at 2463 n.4 (the ICC reviews "only a random sampling of tariff filings, and tariffs with obvious defects are allowed to go into effect"); 97 ICC Ann. Rep. 71-73 (1983) (1.2 million filings, 188 examinations, 11 suspensions); 96 ICC Ann. Rep. 70-73 (1982) (over 900,000 filings, 366 examinations, 30 suspensions). Consequently, the investigation and approval or disapproval by the ICC of a small fraction of the tariffs filed would not seem to signify regulatory approval by the Commission of uninvestigated tariffs like those challenged here.

to answer the first of Justice Brandeis' rhetorical questions and perhaps—although that issue is not presented here—even the second, with a "Yes" rather than with the "No" he thought to be inexorably demanded.

The case for reaching a contrary conclusion today to that reached by Justice Brandeis is particularly strong in the light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates. *See Otter Tail Power Co.* v. *United States, supra*, 410 U.S. at 374 (emphasizing as a reason not to find an implied exemption to antitrust liability that the regulatory statute "indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest.") In the last decade, Congress has passed six major pieces of legislation "aimed at increasing competition and reducing unnecessary federal regulations" in the transportation industry. H.R. Rep. No. 1069, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2285 (accompanying Motor Carrier Act of 1980). These are the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976); the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978); the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); the Household Goods Transportation Act of 1980, Pub. L. No. 96-454, 94 Stat. 2011 (1980); the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); and the Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982). Exposing ratemaking to competitive forces to as great an extent as possible was among the most significant aspects of this deregulation. H.R. Rep. No. 1069, *supra*, at 3-4, 1980 U.S. Code Cong. & Ad. News at 2285-86 (Motor Carrier

Act); H.R. Rep. No. 1035, 96th Cong., 2d Sess. 33-34, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3978-79 (Staggers Rail Act). For example, § 11 of the Motor Carrier Act of 1980, the most directly relevant legislation here, added subsection (d) to 49 U.S.C. § 10708. This bars the Commission from interfering with a rate proposed by individual carriers on the basis that it is too high or too low if the rate is within 10 percent of the rate one year prior to the effective date of the new rate. Paragraph (4) (redesignated 49 U.S.C. § 10708 (d)(6) by the Bus Regulatory Reform Act) provides that rates implemented pursuant to this subsection "shall be subject to the antitrust laws" except that they may be jointly docketed and published pursuant to carrier agreements approved under 49 U.S.C. § 10706. The House Report accompanying the bill explains:

> The thrust of this new subsection is to provide for more pricing freedom and less government regulation and to balance freer entry into the industry, freer expansion of the industry, and the additional competition that will result from other provisions of the bill. The concept, then, is to spur competition both in service and in pricing. Plainly, the intent is to give the carriers and the shipping public the ability to structure their transportation systems and needs around a variety of service and price options. Another anticipated impact is that, by separating the new pricing flexibility from collective ratemaking with its attendant antitrust immunity, the carriers will establish many of their rates independently of one another. This will create a more competitive motor carrier system.

H.R. Rep. No. 1069, *supra*, at 25, 1980 U.S. Code Cong.

& Ad. News at 2307.[4] In a case involving anticompetitive activities after October 1, 1980, the effective date of the Motor Carrier Act of 1980, the change effected by that statute would have to be taken into account. However, appellants have not asked us to treat their claims arising after October 1, 1980 differently from those arising before that date; they have argued rather that passage of the Motor Carrier Act of 1980 "again confirmed" the fact that the *Keogh* doctrine had already been overruled.

Has Keogh been overruled by statute or Supreme Court decision?

Appellants acknowledge, as they must, that the Supreme Court has not expressly overruled *Keogh;* indeed, *Keogh* was reaffirmed and applied to damages claims concerning rates that had been filed with but had not been approved (or disapproved) by the ICC in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453 (1945). Little over a year ago it was applied in *Minsky* v. *Auto Driveway Company*, 734 F.2d 18 (7 Cir. 1984), *cert. denied*, 105

[4] Even more significant restrictions were imposed upon the authority of the ICC to regulate rate competition among rail carriers. Rail carriers may now establish any rate for transportation or other services unless the ICC determines that a carrier has "market dominance" respecting the transportation to which a particular rate applies. 49 U.S.C. § 10701a. A difficult test must be met by a shipper wishing to show that a carrier has such dominance. *See* 49 U.S.C. §§ 10707, 10709. Reese Taylor, Chairman of the ICC, explained to the Congress that the Staggers Rail Act "[b]asically . . . eliminates rate regulation where there is effective competition." Statement of Reese H. Taylor, Jr., Chairman, ICC, Before the Subcomm. on Commerce, Transportation and Tourism of the House Committee on Energy and Commerce on Implementation of the Staggers Rail Act of 1980 at 16 (July 27, 1983). Indeed, one commentator has suggested that, under the Staggers Rail Act, Mr. Keogh no longer would have the remedy before the ICC that was so central to Justice Brandeis' opinion. F. Kahn, *Keogh's Kaput*, 49 I.C.C. Prac. J. 478, 483-84 (1982).

S. Ct. 435 (1984). It has frequently been cited by the Supreme Court with apparent approval. *See United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485 (1932) (courts will leave matters for which express agency remedy under Shipping Act exists to the agency); *Far East Conf.* v. *United States*, 342 U.S. 570, 574 (1952) (quoting *Cunard* and applying it to a Government suit); *United States* v. *RCA*, 358 U.S. 334, 347-48 (1959) (under pervasive regulatory scheme courts must defer to agency's primary jurisdiction); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 310 (1963) (Aviation Act leaves to CAB all questions of injunctive relief respecting route allocation); *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 351 & n.29 (implied repeal of antitrust laws in cases of "plain repugnancy between antitrust laws and regulatory provisions"); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260 (1972) (citing *Keogh* to explain holding in *Georgia* v. *Pennsylvania R.R.*); *Ricci* v. *Chicago Mercantile Exch.*, 409 U.S. 290, 299-300 & n.12 (1973) (citing *Keogh* as an example of the "recurring problem" of conduct seemingly within the reach of both antitrust laws and other regulatory statutes); *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980) (court may have jurisdiction over antitrust action even though remedies are limited to injunctive relief). *But see Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, *supra*, 392 U.S. at 491 n.8 (shipper in *Keogh* had no cause of action "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission").[5] No decision of this or any other circuit

[5] Appellants have not argued that footnote 8 in *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, *supra*, limited *Keogh* to cases where the challenged rates had been approved. Indeed, *Hanover*

[Footnote continued on following page]

has treated *Keogh* as having been overruled with respect to rates for transportation or other services that have been filed with an appropriate federal agency as required by law except when, as in *Essential Communications Sys. Inc.* v. *American Tel. & Tel. Co.*, 610 F.2d 1114, 1121-24 (3 Cir. 1979); *City of Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2 Cir. 1981), and *Litton Sys., Inc.* v. *American Tel. & Tel. Co.*, 700 F.2d 785, 820 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 984 (1984), the agency has itself raised questions regarding the lawfulness of the rates. All these cases, moreover, were suits by competitors rather than users of the service, so that many of the considerations relied upon in *Keogh* would not apply. *See Essential Communications*, *supra*, 610 F.2d at 1122. Nevertheless, appellants have presented arguments challenging the current status of *Keogh* that, although they must ultimately be rejected, warrant detailed consideration.

Appellants' contention that *Keogh* has been overruled by statute rests principally on the Reed-Bulwinkle Act, Pub. L. No. 80-662, 62 Stat. 472 (1948) (current version at 49 U.S.C. § 10706), which authorized the formation of joint associations of carriers upon approval by the ICC and granted full immunity from the antitrust laws (as contrasted with the freedom from private suits by shippers for treble-damages recognized in *Keogh*) with respect to making or carrying out approved agreements. This argument appears neither to have been advanced nor considered in cases citing *Keogh* with approval decided

[Footnote continued from previous page]

Shoe is not referred to in any of the briefs. Seemingly the footnote was addressed only to Justice Brandeis' fourth reason. We hesitate to believe that this footnote reference was meant to overrule an opinion which had been and continues to be so widely cited and applied.

since 1948. The legislative history of the Reed-Bulwinkle Act, however, refutes the contention that Congress intended to overrule the *Keogh* doctrine in enacting that legislation.

The practice of forming organizations of carriers to facilitate joint action by participating members long antedated the Reed-Bulwinkle Act. *Keogh* itself dealt with such an organization. *See* 260 U.S. at 159-60. These organizations offered a practical means of dealing with the many matters, among the most important of which was ratemaking, as to which coordinated action was felt necessary. *See* H.R. Rep. No. 1100, 80th Cong., 2d Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1849-54 (accompanying Reed-Bulwinkle Act). In its 1898 Annual Report, the ICC concluded that "to one familiar with actual conditions it seems practically out of the question to establish rates that are relatively just without conference and agreement." 12 ICC Ann. Rep. 15-16 (1898). Similarly, the House Report accompanying the Reed-Bulwinkle Act. which repeats the Senate Report and incorporates additional material, concluded:

> It is recognized by all who are familiar with the problems of transportation that the carriers subject to the Interstate Commerce Act cannot satisfactorily meet their duties and responsibilities thereunder, and the basic purposes of that act cannot be effectively carried out, unless such carriers are permitted to engage in joint activities to a substantial extent.

H.R. Rep. No. 1100, *supra*. 1948 U.S. Code Cong. & Ad. News at 1847.

Nonetheless, legislation according express antitrust immunity to joint activity by land carriers was slow in

coming. Transportation Act, 1920, Pub. L. No. 66-152, 41 Stat. 456, 480, 482, provided immunity from the antitrust laws for approved agreements respecting certain kinds of transactions, such as poolings, divisions, consolidations, mergers. acquisitions and the like, but failed to immunize many of the most important activities requiring joint agreements, such as ratemaking and establishing through routes and joint rates.[6] Congress failed to immunize these activities earlier because for many years legislation was not deemed necessary. As the House Report on the Reed-Bulwinkle Act explains, joint carrier organizations had been operating openly with the full knowledge of the ICC, state regulatory bodies, shippers and others involved in the transportation industry. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1846. In many instances, joint ratemaking associations were "maintained with the approval and cooperation of the shippers . . . and [were] encouraged by the Commission and various other agencies and departments of the Government as both necessary and desirable. In fact, various departments and agencies of the Government . . . frequently utilized them to advantage." *Id.* Commissioner Clyde Aitchison of the ICC testified that during the early decades of the century both the Department of Justice and the courts understood that joint ratemaking by common

[6] The limited immunity granted to land carriers for approved transactions in Transportation Act, 1920, was amended, but not expanded, by the Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 905. By contrast, Congress provided a broad exemption from antitrust liability for water carriers whose agreements were approved by the United States Shipping Board (now the Federal Maritime Commission) under the Shipping Act of 1916, 46 U.S.C. § 814, and for air carriers whose agreements were approved by the Civil Aeronautics Board under the Civil Aeronautics Act of 1938, 49 U.S.C. § 492 (repealed and reenacted in 1958 as 49 U.S.C. § 1382). These provisions were relied upon by Congress as precedents for the Reed-Bulwinkle Act. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1848-49.

carriers was necessary to the operation of the transportation system and did not challenge this activity under the antitrust laws as long as carriers preserved their right of independent action. *See Hearings on H.R. 2536 Before the Senate Comm. on Interstate Commerce*, 79th Cong., 2d Sess. 1133-48 (1946) [hereinafter cited as 1946 Senate Hearings]. However, in the early 1940's, the Department of Justice began to question the legality of the cooperative activities of the carriers. Officials of the Department pointed out that there was a range of "reasonable" rates under the ICA and maintained that joint ratemaking needlessly kept rates at the upper end of this range in contravention of the policies underlying the antitrust laws. *See* 1946 Senate Hearings, *supra*, at 556-90 (testimony of Arne Wiprud, former Chief of Transportation Section, Antitrust Division, Department of Justice), 744-67 (testimony of Wendell Berge, Assistant Attorney General); *Hearings on S. 110 Before the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 65-81 (1947) (testimony of Wendell Berge) [hereinafter cited as 1947 Senate Hearings]; *Hearings on H.R. 221 and S. 110 Before the House Comm. on Interstate and Foreign Commerce*, 80th Cong., 1st Sess. 174-75 (1947) (testimony of Albert Boggess, Special Assistant to the Attorney General) [hereinafter cited as 1947 House Hearings]. This policy shift manifested itself in the form of a series of suits brought by the Department of Justice against carrier organizations:

> Efforts at Chicago in 1942 to indict certain railroads, motor carriers, and others under the antitrust laws for participating in those activities were stopped because it was believed that such prosecution would seriously interfere with the war effort. Early in 1943 an indictment under the antitrust laws of certain

> motor carriers and motor carrier rate associations was returned at Denver and, after trial, all of the defendants were acquitted by the verdict of a Federal court jury. In 1943 a certificate was issued by the Chairman of the War Production Board declaring rate bureaus and similar carrier organizations to be requisite to the prosecution of the war. In 1944 an injunction suit under the antitrust laws was brought by the Department of Justice in the United States District Court for the District of Nebraska against the western railroads and the Association of American Railroads and others to enjoin them from carrying on various cooperative activities . . . .

H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1846. In addition, in 1944 the State of Georgia filed a suit in the Supreme Court as *parens patriae* alleging rate-fixing by eastern and southern railroads. This suit led to the opinion in *Georgia* v. *Pennsylvania R.R.*, *supra*, where the Court dismissed the damages claims on the authority of *Keogh* but went on to hold that the State could maintain a suit to enjoin the alleged rate-fixing conspiracy since "that is a matter over which the Commission has no jurisdiction." *Id.* at 455. The suit was still pending on its merits during the deliberations over the Reed-Bulwinkle Act.

These suits, together with the expiration of the War Production Board's certificate of exemption in 1946, provided the immediate impetus for the enactment of the Reed-Bulwinkle Act. *See* H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News at 1847; *cf.* 1947 Senate Hearings, *supra*, at 6 (testimony of J. Monroe Johnson, Director, Office of Defense Transportation). Congress was concerned with the effect of such antitrust actions on transportation policy: a recurring theme in the testimony at the hearings was that antitrust suits might

conflict with the national transportation policy manifested in the ICA. *See, e.g.*, 1946 Senate Hearings, *supra*, at 365-70 (testimony of Sam B. Winn, Chairman, Western Conference Commission), 1171-72 (testimony of Clyde Aitchison, Commissioner, ICC); 1947 House Hearings, *supra*, at 9-11 (statement of Frederick Hamley, General Solicitor, NARUC). Congress recognized that it could not by legislation deal with each instance of joint action by carriers to resolve whatever conflict may exist between the principles of the antitrust laws and the national transportation policy. H.R. Rep. No. 1100, *supra*, 1948 U.S. Cong. & Ad. News at 1848. Rather, in the words of the House Committee:

> The only practical approach to the problem is to grant to a competent administrative agency, as is proposed in the bill, the authority to resolve the conflict in specific instances of proposed joint action by carriers.
>
> Since this problem arises in the relatively circumscribed field of transportation, the agency which is peculiarly well qualified to exercise this authority is the Interstate Commerce Commission. The bill here reported, therefore, places this responsibility upon that Commission.
>
> *The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body* upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted.

Id. (emphasis added).

Appellants argue that the Reed-Bulwinkle Act was intended to be a comprehensive regulation of rate-making agreements: If the carriers acted within the terms of an approved agreement their conduct would be immunized from all antitrust liability, including the proceedings for redress by injunction and criminal prosecution left open by *Keogh* as interpreted in the *Georgia* case; on the other hand, if they acted pursuant to an unapproved agreement or without complying with the terms of an approved agreement, they were to be subject to damages liability, *Keogh* notwithstanding. There would be some force in this contention if the Committee Report had said merely "[t]he bill leaves the antitrust laws to apply with full force and effect to carriers . . . except," etc. However, the Committee was at pains to insert the qualifying phrase "so far as they are now applicable." *Keogh* had ruled that the antitrust laws were not applicable so as to allow shippers to maintain suits for damages resulting from filed tariffs. Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

This silence in the legislative history is particularly significant in that the Congress that enacted the Reed-Bulwinkle Act was undoubtedly familiar with the *Keogh* doctrine. *Keogh* had been expressly reaffirmed and applied in the *Georgia* case, which received extensive and detailed consideration in the hearings: more than a dozen witnesses testified about the case, and the opinion of the Supreme Court was made a part of the Committee record; indeed, Arne Wiprud, formerly of the Antitrust Division of the Department of Justice, read to the Committee the passage from the Supreme Court's opinion reaffirming the

limitation on shippers' rights to recover treble-damages. 1946 Senate Hearings, *supra*, at 581. Several other witnesses discussed the *Keogh* decision itself. Wendell Berge, then the Assistant Attorney General in charge of the Antitrust Division, read passages from the opinion to the Committee, including the passage recognizing an exception for antitrust liability in Government proceedings. 1946 Senate Hearings, *supra*, at 799; *see also* 1947 Senate Hearings, *supra*, at 73. Commissioner Aitchison, the importance of whose testimony is underscored by its having been quoted at length in the Committee Reports, ended his explanation of the history of rate regulation and the antitrust laws with a discussion of the *Keogh* and *Georgia* cases. He explained to the Committee that "the net result of the Keogh decision," which was "to limit the force of section 7 of the Sherman Act, as related to wrongs for which there was a money-damage remedy afforded under the Interstate Commerce Act," did not go far enough because it left open the possibility of proceedings by the Government. 1946 Hearings, *supra*, at 1148-49. He urged the Congress to extend antitrust immunity to Government and private injunction actions challenging agreements that had been approved by the ICC. No one suggested, however, that *Keogh* should be overruled, and there is no basis under the circumstances to infer that Congress intended to do so by implication, particularly since neither the purposes nor the operation of the *Keogh* doctrine and the Reed-Bulwinkle Act conflict.

The immunity established in 1948 in the Reed-Bulwinkle Act remained, with modifications not relevant here, until 1980. In that year, Congress passed the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (the "1980 Act"). Section 14, 49 U.S.C. § 10706, revised the requirements for a carrier to obtain immunity from

antitrust liability and limited the scope of the available immunity. Appellants do not argue that this legislation overruled *Keogh*, but assert only that "[p]assage of the Motor Carrier Act of 1980 . . . again confirmed that antitrust immunity is conditioned upon compliance with a Congressionally approved regulatory plan." As discussed above, the Reed-Bulwinkle Act had no such effect with respect to the *Keogh* doctrine; a brief review of the legislative history confirms that this conclusion applies as well to the 1980 Act.[7]

The immunity from the antitrust laws granted in the Reed-Bulwinkle Act was among the chief concerns in the debates over the 1980 Act. According to the House Report, "[n]o issue has received more attention during the debate before the Committee than whether this immunity should be allowed to continue. The debate centered on whether there continues to be a reasonable public quo in return for the collective ratemaking quid of the Reed-Bulwinkle Act." H.R. Rep. No. 1069, *supra*, at 27, 1980 U.S. Code Cong. & Ad. News at 2309. After extensive hearings conducted over a two-year period, the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee proposed eliminating antitrust immunity for

---

[7] It is not entirely clear that the 1980 Act even applies to the facts of this case. The complaint alleges that the illegal conspiracy began "at least as early as 1966 and continue[d] at least until 1981." Although the 1980 Act became effective on October 1, 1980, the House Report acknowledges that:

> [m]ost likely, rate bureau agreements now in existence will not meet the new requirements of this section. Plainly, a transition period is needed during which these agreements remain in effect until the bureaus can comply with this section. This is the intent of the Committee.

H.R. Rep. No. 1069, *supra*, at 30, 1980 U.S. Code Cong. & Ad. News at 2312. Since we conclude that the 1980 Act does not overrule *Keogh*, we need not address this question.

all collective ratemaking, although it recommended retaining immunity for joint tariff publication and interline arrangements. *Committee on the Judiciary, 96th Cong., 2d Sess., Federal Restraints on Competition in the Trucking Industry: Antitrust Immunity and Economic Regulation* 151 (Comm. Print 1980); *see also id.* at 45-69, 145-51. The ICC, on the other hand, urged more modest revisions, in particular the withdrawal of immunity for joint agreements respecting individual carriers' single-line rates. *See Motor Carrier Act of 1980: Hearings on S. 2245 Before the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 2d Sess. 1509, 1865-68 (statement of Darius Goskins, Chairman, ICC). Representatives of other organizations made various recommendations for retaining the Reed-Bulwinkle Act, revising it in minor ways or substantially altering it. *See id. passim.* The predominant opinion was critical of the existing rate bureau process and recommended that the immunity it enjoyed from the antitrust laws be curtailed substantially; Congress acquiesced in this. S. Rep. No. 641, 96th Cong., 2d Sess. 13-15 (1980). As finally passed, the 1980 Act significantly revised the antitrust immunity provided in the Reed-Bulwinkle Act. *See* H.R. Rep. No. 1069, *supra*, at 29-30, 1980 U.S. Code Cong. & Ad. News at 2311-12 (summarizing scope of permissible collective ratemaking). However, no mention appears to have been made of *Keogh*, and apart from the particular changes made by § 10706 Congress did not expand antitrust liability beyond that which existed under the Reed-Bulwinkle Act.

Appellants' strongest argument that the Supreme Court has overruled *Keogh*, albeit *sub silentio*, is based on *Carnation Co.* v. *Pacific Westbound Conf.*, 383 U.S. 213 (1966). Carnation, a shipper in foreign commerce, alleged that the Pacific Westbound Conference, an association of

carriers by water approved under the Shipping Act by the Federal Maritime Commission ("FMC"),[8] increased the rate for shipping evaporated milk pursuant to an agreement with the Far East Conference, another approved association. The rates had been filed with the FMC as required by 46 U.S.C. § 817(a); however, at the time the events alleged occurred, the Shipping Act also provided:

> Every common carrier by water . . . shall file immediately with the Federal Maritime [Commission] a true copy . . . of every agreement, with another such carrier . . . fixing or regulating transportation rates or fares . . . .
>
> . . . .
>
> All agreements, modifications, or cancellations made after the organization of the [Commission] shall be lawful only when and as long as approved by the [Commission], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.
>
> Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of [the antitrust laws] . . . .

46 U.S.C. § 814 (1958). Carnation alleged that Pacific Westbound and Far East agreed, without obtaining FMC

---

[8] The United States Shipping Board was created in 1916 to enforce the Shipping Act. Its functions were transferred in succession to the United States Shipping Board Bureau in 1933, the United States Maritime Commission in 1936, the Federal Maritime Board in 1950, and, finally, the Federal Maritime Commission in 1961. We will refer throughout to the last of these, although some of the developments described in the text involved an agency with a different name.

approval, to surrender their right to take independent action and that Pacific Westbound maintained the increased rate only because Far East would not agree to its being lowered. This conduct, Carnation contended, forfeited the express immunity from antitrust liability provided in § 814 and was unlawful *per se* under the antitrust laws.

The carriers argued that the Shipping Act repealed all antitrust regulation of ratemaking activities of the shipping industry and that the exclusive remedy for shippers aggrieved by carriers' rates was before the FMC. The carriers relied for this argument on *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 483-88 (1932), where the Court affirmed the dismissal of an antitrust action to enjoin a dual-rate system because the FMC had primary jurisdiction, and *Far East Conf.* v. *United States*, 342 U.S. 570, 576-77 (1952), where the Court applied *Cunard* to bar a similar challenge by the United States as shipper. Carnation argued that these cases were distinguishable on the ground that the plaintiffs there sought an injunction that would have interfered with the FMC's performance of its functions respecting the conduct challenged. The carriers responded that the doctrine that an administrative remedy supersedes antitrust remedies originated in a treble-damages action, citing *Keogh*, which, they pointed out, was relied on in *Cunard* and *Far East*.

The Supreme Court rejected the argument that the Shipping Act displaced the antitrust laws entirely and held that "the implementation of rate-making agreements which have not been approved by the Federal Maritime Commission is subject to the antitrust laws." 383 U.S. at 216. The Court reasoned that Congress would not have

created an expressly limited immunity such as the one found in § 814 if it had intended to immunize the industry completely from antitrust liability. *Id.* at 216-20. *Cunard* and *Far East* were distinguished on the ground that these cases "merely hold that courts must refrain from imposing antitrust sanctions for activities of debatable legality under the Shipping Act in order to avoid the possibility of conflict between the courts and the Commission." *Id.* at 220. However, *Cunard* and *Far East* "permit courts to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." *Id.* at 221. An award of treble-damages for past and completed conduct which clearly violated the Shipping Act would not interfere with the authority of the FMC, *id.* at 222, although to avoid conflict with the agency, the question whether the conduct challenged clearly violated the Shipping Act (in *Carnation* this depended upon whether the rates were filed pursuant to approved or unapproved agreements) did require preliminary resort to the FMC, *id.* at 222-23. Accordingly, the Court directed that the action be stayed pending the conclusion of proceedings before the agency, with instructions to allow the suit to proceed if the FMC found that the agreements were not approved. *Id.* at 223-24.

The Court did not refer to *Keogh* in its opinion. Since, as appellants argue here, the result in *Carnation* appears on its face to conflict with the holding in *Keogh* that filed tariffs define the legal rights between shipper and carrier "unless and until disapproved" by the agency, they deem this omission to imply that the Court intended to overrule *Keogh* but for some reason was unwilling to say so. We think it more plausible that, if the Court in-

tended to overrule *Keogh* or even seriously to question that decision, it would have discussed or at least mentioned the fact. Moreover, a sound basis existed for distinguishing *Keogh* and finding, as the Court apparently did, that the filing of tariffs under the Shipping Act does not limit the rights of shipper vis-a-vis carrier.

As has been pointed out above, in the years after *Keogh* was decided, implied exemptions to the antitrust laws fell into strong disfavor. By the time *Carnation* was decided in 1966, the necessity of implying a repeal of the antitrust laws was measured by the pervasiveness of the regulation of the industry in question and the authority of the regulatory agency to perform the antitrust function of regulating competition with respect to the challenged practice. *See* Hale & Hale, *Mergers in Regulated Industries*, 59 Nw. U.L. Rev. 49, 54-56 (1964); Note, *The Antitrust Immunity Doctrine and United States* v. *National Association of Securities Dealers: Stepping on Otter Tail*, 28 Hastings L.J. 387, 388-89 396-411 (1976); *e.g.*, *United States* v. *RCA*, 358 U.S. 334, 346-52 (1959) (no repeal for broadcasters under Communications Act of 1934); *Silver* v. *New York Stock Exchange*, *supra*, 373 U.S. at 347, 357-65; *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 348-52. Compared to the ICA, the Shipping Act is a very limited regulatory scheme. It imposes only a few general duties, and the central purpose of the statute was to provide for industry self-regulation through agreements between carriers under the aegis of the FMC, which was to approve or disapprove these agreements with an eye to the prevention of certain practices deemed unjustly or unfairly discriminatory. 46 U.S.C. §§ 811-816; *see Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 487-91 (1958); *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 241-43

(1968); Report of the Antitrust Division, Department of Justice, *The Regulated Ocean Shipping Industry* 34-35 (1977) [hereinafter cited as DOJ Report]; Note, *Antitrust and the Shipping Industry: Interpretation of the Shipping Act of 1916*, 12 N.Y.U. J. Int. L. & Pol. 115, 116-20 (1980). The ICA and the Shipping Act differ significantly with respect to the relative powers of the ICC and the FMC concerning rate regulation. As the Senate Report accompanying the 1961 amendments to the Shipping Act noted, "[w]hereas Congress has vested rate control powers and responsibilities in Government regulatory agencies concerned with domestic surface and air transportation, it has heretofore given to the maritime regulatory agencies no similar mandate over international shipping rates." S. Rep. No. 860, 87th Cong., 1st Sess. 5 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 3108, 3112; *see also Federal Maritime Bd.* v. *Isbrandtsen Co.*, *supra*, 356 U.S. at 490-91; 1947 Senate Hearings, *supra*, at 593-94 (statement of Arne Wiprud) (arguing that the Shipping Act is not a valid precedent for the Reed-Bulwinkle Act).[9] Although the FMC can and does take effects on competition into account in approving conference agreements under 46 U.S.C. § 814, *see Federal*

[9] The Alexander Report, which led to the enactment of the Shipping Act and which was carefully considered by the Supreme Court in *Carnation*, *see* 383 U.S. at 218-19, acknowledged that "the steamship business differs essentially from that of the railroads" as regards the desirability of rate regulation. H.R. Doc. No. 805, 63d Cong., 2d Sess. 420 (1914) [hereinafter cited as Alexander Report]; *see also* H.R. Rep. No. 659, 64th Cong., 1st Sess. 30 (1916) (accompanying the Shipping Act of 1916 and incorporating findings of the Alexander Report); S. Rep. No. 860, *supra*, at 25, 1961 U.S. Code Cong. & Ad. News at 3132 ("Your committee finds, however, that it would be a serious mistake at this time in world affairs for the U.S. Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the 'reasonableness' of international freight rates.")

Maritime Comm'n v. *Aktiebolaget Svenska Amerika Linien*, *supra*, 390 U.S. at 243-46; *Mediterranean Pools Investigation*, 9 F.M.C. 264, 288-90 (1966), the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard. *See* DOJ Report, *supra*, at 61-62 & n.143. The FMC has only "limited ratemaking authority" over foreign commerce, *id.* at 37, 47, and, consequently, its ability to award reparations is also circumscribed, *cf.* 46 U.S.C. § 821(a). After a hearing it may disapprove a rate that it finds to be "so unreasonably high or low as to be detrimental to the commerce of the United States." 46 U.S.C. § 817(b)(5). However, the Commission is without power to establish a new "reasonable" rate and can only require the conference or carrier to file a more acceptable one. The FMC's sole ratemaking power is the power to alter rates "to the extent necessary to correct . . . unjust discrimination or prejudice" towards shippers or ports under 46 U.S.C. § 816. Unlike the ICC, the FMC cannot establish through routes, joint classifications and joint rates, and cannot suspend a proposed tariff.[10] *See* Fair & Guandolo, Transportation Regulation 46-47, 200-209 (7th ed. 1972); DOJ Report, *supra*, at 36, 47. Thus, the pervasive authority of the ICC respecting the rates and business of carriers under its jurisdiction is absent from transportation subject to the more limited scrutiny of the FMC. *See In re Ocean Shipping Antitrust Litig.*, 500 F. Supp. 1235, 1241 (S.D.N.Y. 1980) (distinguishing *Keogh* because

[10] In 1979, the FMC was given the limited power to suspend tariffs, subject to disapproval by the President, in connection with an investigation into illegal rebating by a carrier. *See* Shipping Act Amendments of 1979, Pub. L. No. 96-25, § 5, 93 Stat. 71, 72 (codified at 46 U.S.C. § 821(c)(2), (4)).

"[t]he FMC wields relatively weak power to supervise tariffs").[11]

Appellants' reliance on *ATA*, *supra*, 104 S. Ct. 2458, has even less force. The Court there was called upon to decide whether the ICC could declare effective tariffs that later investigation revealed to have been agreed upon in violation of section 14 of the 1980 Act, 49 U.S.C. § 10706, retroactively ineffective. This would entitle shippers to rates as if the unlawful tariff had never existed and thus require the carriers to pay reparations equal to the excess of what the carriers actually collected over the rates in effect prior to those declared unlawful. Such a remedy would often expose carriers to damages liability greatly in excess of their potential liability in an action before the ICC under § 11705(b)(3), which is limited to the extent to which an unlawful tariff was unreasonable or discriminatory and which thus gives the carrier the full benefit of the available range of lawful rates. The carriers argued that this new remedy was unnecessary because

[11] The limited authority of the FMC under the Shipping Act stands in contrast not only to the powers and duties of the ICC respecting land carriers, but also to the equally extensive authority conferred upon the ICC to regulate domestic shipping in the Transportation Act of 1940, Pub. L. No. 76-785, 54 Stat. 898, 929-952, which added title III to the Interstate Commerce Act and restricted the jurisdiction of the FMC over domestic waterborne commerce to the offshore trade between the United States and the territories. *See* H.R. Rep. No. 1217, 76th Cong., 1st Sess. 21-26 (1939); H.R. Conf. Rep. No. 2016, 76th Cong., 3d Sess. 76-78 (1940). *See also* Act of July 7, 1958, Pub. L. No. 85-508, § 27(b), 72 Stat. 339, 351 (Alaska statehood bill preserving FMC jurisdiction over trade with Alaska); Act of March 18, 1959, Pub. L. No. 86-3, § 18(a), 73 Stat. 4, 12 (Hawaii statehood bill preserving FMC jurisdiction over trade with Hawaii). In its brief, Carnation argued, persuasively it seems, that *Keogh* should be limited to the pervasive regulatory schemes enforced by the ICC and not applied to water carriage subject to the much less intrusive supervision of the FMC under the Shipping Act. *See* Petitioner's Brief at 43-48, *Carnation*, *supra*.

suits under § 11705(b)(3) and antitrust damages created adequate disincentives to the filing of unlawful tariffs; the ICC disagreed, and the Court sided with the Commission. *Keogh* was not mentioned in the opinion and was only cited twice in the briefs for minor propositions.[12] The Court clearly assumed that shippers can recover treble-damages for filed tariffs that embody antitrust violations, but only *after* the ICC finds a tariff that was filed and became effective to be unlawful. *See* 104 S. Ct. at 2462 ("Where the Commission finds an effective tariff unlawful. injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow"); *see also id.* at 2466-67 (opinion of the Court), 2471 (O'Connor, J., dissenting). Thus, appellants read too much into the opinion in asserting that this result overrules *Keogh* with respect to tariffs that have been approved or have not been disapproved, although *ATA* does render *Keogh* inapplicable where the ICC has expressly found a filed tariff to be unlawful. This is of no aid to appellants, however, since the tariffs challenged here were not declared unlawful by the ICC.

Injunctive Relief and Damages from Anticompetitive Acts Other than Agreements to Fix Rates

Although appellees had moved for judgment on the pleadings only with respect to appellants' claims for

12 *Keogh* was cited in a footnote in the brief of a group of railroads as *amici curiae* as additional authority for the proposition that "[e]ven for an admitted violation of the Act's substantive provisions, a shipper is not entitled to a refund 'without proof of actual damages.'" Brief of Aberdeen & R. R.R., et al. at 12 n.20, *ATA*, *supra*. *Keogh* was also cited in the reply brief of the ICC in refutation of the argument that antitrust liability is an adequate deterrent; the ICC asserted: "But it is doubtful that many shippers can undertake an antitrust action given the costs and risks of such litigation. See *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922)." Reply Brief of Petitioners at 5, *ATA*, *supra*.

damages and not with respect to their claim for an injunction, a position well advised in light of *Georgia* v. *Pennsylvania R.R.*, *supra*, 324 U.S. at 454-55, Chief Judge Curtin dismissed the complaint in its entirety. He did not explain or even discuss why he dismissed *sua sponte* the claims for injunctive relief. The issue whether appellants could obtain an injunction had not been briefed. There is only a passing reference in a footnote in appellees' memorandum in support of the motion to dismiss to the effect that entry of the consent decree in the Government's action against NFTB would moot the injunction claims, and an equally brief response in a footnote in appellants' memorandum in opposition to this motion that the injunction claims "are not at issue" and thus "need not be dealt with." The injunction claims were neither raised nor discussed during the oral argument before the district court.

The district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard. *Lewis* v. *New York*, 547 F.2d 4, 5-6 & n.4 (2 Cir. 1976) ("Failure to afford an opportunity to address the court's *sua sponte* motion to dismiss is, by itself, grounds for reversal"); *Schlesinger Investment Partnership* v. *Fluor Corp.*, 671 F.2d 739, 742-43 (2 Cir. 1982); *see also Dodd* v. *Spokane County*, 393 F.2d 330, 334 (9 Cir. 1968); *Literature, Inc.* v. *Quinn*, 482 F.2d 372, 374 (1 Cir. 1973). Appellees urge that we nonetheless affirm the lower court's dismissal of the injunction claims because remand "would be a futile gesture in light of the injunction already obtained by the Government" in *United States* v. *Niagara Frontier Tariff Bureau*, *supra* note 1, 1984-2 Trade Cas. at ¶ 66,167. However, although the consent decree is far reaching, several of its provisions

are limited in duration and applicability. *See, e.g., id.* at parts VI. XIII. Moreover, as appellants have the right to seek relief beyond that obtained by the Government, *Madyun* v. *Thompson*, 657 F.2d 868, 871-72 (7 Cir. 1981), there may well remain additional matters as to which injunctive relief is appropriate. These issues cannot be determined on the sparse record before us. We must, therefore, remand to allow the plaintiffs an opportunity to show whether they are entitled to injunctive relief. To avoid waste of time and money, the district court may find it appropriate to address at the outset the issue of mootness raised by appellees on the basis of the Government consent decree.

In addition, appellants should be afforded an opportunity on remand to amend their complaint to state a claim for damages consistent with *Keogh*. That case applies only where the damages sought relate to filed tariffs, whether these result from a combination to file higher tariffs or from a combination to prevent others from taking independent action to file lower tariffs. *See* 260 U.S. at 161-63; *cf. City of Groton, supra*, 497 F. Supp. at 1049-52 (dividing claims into those relating to filed tariffs and those relating to anticompetitive behavior "beyond the mere promulgation of rates" and applying *Keogh* only to the former); *City of Groton, supra*, 662 F.2d at 928-34 (reversing the district court but adopting the same analytical framework). A shipper may recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales.

Appellants alleged that appellees conspired together and that:

> [t]he aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators, the substantial terms of which were to fix, raise and maintain prices *and to inhibit or eliminate competition* for the transportation of freight by motor carrier between the United States and the Province of Ontario, Canada without complying with the terms of the NFTB agreement *and by otherwise engagiing in conduct that either was not or could not be approved by the ICC.*

Square D Complaint at ¶ 22 (emphasis added); Big D Complaint at ¶ 19. Appellants alleged further that appellees established a "Principals Committee" to further the conspiracy and that this committee "engaged in the joint setting of rates and related policies *and also agreed upon methods by which to inhibit competition for the transportation of freight. . . .*" Square D Complaint at ¶ 23(a) (emphasis added); Big D Complaint at ¶ 20 (a).[*] At oral argument on the motion to dismiss, appellants' counsel explained to the court that these allegations charged appellees with having done more than simply file excessively high traiffs. In addition, counsel explained, appellees agreed "not to solicit or to try to attract certain types of traffic," and engaged in boycotts and other acts which interfered with the ability of non-conspiring carriers to provide transportation services in order to discourage these carriers from taking independent action and to coerce them into accepting the conspirators' anticompetitive strategy.

Chief Judge Curtin held that "[w]hatever the beadth of plaintiffs' allegations, the complaint essentially focuses on what plaintiffs claim are unjust and excessive rates." To be sure, the portions of appellants' complaints that

state the nature of the injury suffered allege only injury caused from having to pay rates higher than those that would otherwise have prevailed. Square D Complaint at ¶ 26; Big D Complaint at ¶¶ 22, 23 However, the acts charged in the allegations quoted above could also support a claim that appellees injured appellants' business by impeding appellants' ability to market and sell their goods. As Professors Wright and Miller have indicated, "[a]mendment should be refused only if it appears to a certainty that plaintiff cannot state a claim." 5 Wright & Miller, *supra*, § 1357 at 612-13 (citing cases); *see also S.S. Silberblatt, Inc.* v. *East Harlem Pilot Block*, 608 F.2d 28, 42 (2 Cir. 1979) (leave to amend should be granted if plaintiff "has at least colorable grounds for relief"). Thus, on remand, appellants should be afforded an opportunity, if they believe the facts justify it, to amend their complaint to state a proper claim for damages. Such a claim would, of course, be subject to any appropriate motions by appellees.

Insofar as the judgment dismissed appellants' claims for damages in respect of filed rates, it is affirmed. Insofar as it dismissed the claim for an injunction, it is reversed and the cause is remanded for further hearing. On remand, appellants shall be given an opportunity to amend their complaints, if so advised, to state claims for damages other than damages arising from the filed tariffs. No costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of April, one thousand nine hundred and eighty-five.

Present: HON. WILFRED FEINBERG, Chief Judge
HON. HENRY J. FRIENDLY
HON. IRVING R. KAUFMAN

CIRCUIT JUDGES,

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.

Plaintiff-Appellants,

AGAINST

84-7831

NIAGARA FRONTIER TARIFF BUREAU, INC., BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES, LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA), INC.; TNT CANADA, INC.,

Defendant-Appellees.

UNITED STATES COURT OF APPEALS
FILED
APR 9 1985
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

FILED
MAY 6 8:32 AM '85
U.S. DISTRICT COURT
W.D. OF N.Y.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in part, reversed in part and remanded without costs to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

by _____
Edward J. Guardaro, Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH, CLERK

By _____
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiff(s)

v. **CIV-84-158C**

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Defendant(s)

SIR/MADAM: Take notice of an ORDER and a JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 25th day of September, 1984 and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 25th day of September, 1984.

Dated: Buffalo, New York
September 25, 1984

JOHN K. ADAMS, Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Douglas V. Rigler, Esq.
Donald L. Flexner, Esq.
Lauren D. Rachlin, Esq., Joseph E. Zdarsky
Howard J. Ross, Esq.
H. Laddie Montague, Esq.
Arnold Levin, Esq., Howard Sedran, Esq.
Richard Greenfield, Esq.

Bryce Rea, Jr., Esq.
Peter A. Green, Esq., Charles L. Freed, Esq.
Peter D. Standish, Esq.
J. Edmund deCastro, Jr., Esq.
Robert B. Conklin, Esq.
James M. Kieffer, Esq., Brian P. Fitzgerald, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiffs,

-VS-

CIV-84-158C

NIAGARA FRONTIER TARIFF BUREAU INC.; BONDY CARTAGE LIMITED; DOMINION-CONSOLIDATED TRUCK LINES LIMITED; ICL INTERNATIONAL CARRIERS LIMITED; INTER-CITY TRUCK LINES (CANADA) INC.; TNT CANADA INC.,
Defendants.

APPEARANCES: FOLEY & LARDNER (DOUGLAS V. RIGLER, ESQ., of Counsel), Washington, D.C., for Plaintiffs.

WILLIAM, RANDOLPH, SMITH, CROWELL & MORING (DONALD L. FLEXNER, ESQ., of Counsel), Washington, D.C., for Defendants.

The court has deferred ruling on various pending discovery motions and a motion for class certification. Before the court is defendants' motion to dismiss. Fed.R.Civ.P. 12(c) and 12(h)(2).

The allegations in the complaint may be summarized as follows. The Niagara Frontier Tariff Bureau, Inc. [NFTB] is a motor carrier rate bureau with headquarters in Buffalo, New York. It is organized and operates under an agreement which has been filed with and approved by the Interstate Commerce Commission [ICC]. The NFTB is a defendant, along with various named common carrier defendants that are defendants that are members of NFTB. These carrier defendants move goods between the United States and Canada.

Plaintiffs now allege that beginning in 1966 and continuing until about 1981, the defendants and their coconspirators entered into a conspiracy to fix prices and to eliminate or restrict competition for the transportation of goods between the United States and the Province of Ontario.

Specifically, the plaintiffs allege that the defendants and their coconspirators "[p]articipated in a Principals Committee which was comprised of the senior management officials of NFTB carriers" but which "was not authorized or approved by the ICC to engage in rate-making conduct. [Complaint, ¶ 23(a).] Plaintiffs allege that this Committee was used to set rates and inhibit competition. This, the plaintiffs allege, was done by way of threats, coercion, and retaliatory rate reductions. Plaintiffs allege that all of this was accomplished in secret; none of these activities was disclosed to the ICC.

As a result, the plaintiffs claim violations of section 1 of the Sherman Act [15 U.S.C. § 1] and sections 4 and 16 of the Clayton Act [15 U.S.C. §§ 15, 26] and seek treble damages for the loss of benefit of legitimately competitive rates.

Although two separate actions were filed by Square D Company and Big D Building Supply Corp., this court's order of June 27, 1984, directed that these two actions proceed as a consolidated suit. A third and similar action filed by the United States against NFTB has been discontinued by consent of the parties and by order of this court, *United States v. NFTB*, No.

83-1313 (W.D.N.Y. June 26, 1984). All that remains is this consolidated civil antitrust suit.

I.

The defendants now move to dismiss, arguing failure to state a claim, and seek judgment on the pleadings. Defendants insist that *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and its progeny completely bar plaintiffs' antitrust damage claims.

Keogh, like the plaintiffs in this case, was a shipper. The defendant railroads in the *Keogh* case formed an association and agreed to certain interstate freight rates which the ICC determined were reasonable and not discriminatory. Failing to convince the ICC that the defendants' rates were unlawful, Keogh filed a suit in federal court challenging the rates under the Sherman Act. The Court held that Keogh could not obtain antitrust damage against the defendant carriers based upon a carrier conspiracy to fix tariff rates which were filed with the ICC and subject to that agency's regulatory control.

The reasoning of *Keogh* was followed in *Georgia v. Pennsylvania Railway Co.*, 324 U.S. 439 (1945). *Georgia* sought money damages as well as injunctive relief. The Supreme Court held that in light of *Keogh*, there was no basis for the recovery of money damages, even if the conspiracy alleged were shown to exist. The complaint in *Georgia* also alleged coercion and discrimination, but the Court held that this did not create a basis for shipper antitrust damage claim against carriers. An injunctive action, and even a criminal prosecution, may go forward, but a claim for treble damages under the antitrust statute may not.

To avoid the directives of the Supreme Court, plaintiffs now argue that *Keogh* does not apply because 1) subsequent legislation has diffused the authority of *Keogh*, and 2) the facts of the instant case amount to a "broader conspiracy" that does not fall within the purview of *Keogh*.

II.

First, the legislative activity since *Keogh* has defined and preserved antitrust immunity where a rate agreement was implemented "in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission." Reed-Bulwinkle Act, 62 Stat. 472 (1948). The House Report supporting this legislation states that:

> [t]he bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to joint agreements or arrangements between them as may have been submitted to the [ICC] and approved by that body."

H.R. Rep. No. 1100, 80th Cong., 1st Sess., at 5 (1947).

The Reed-Bulwinkle Act was intended "to dispel the uncertainty" about the rate bureaus' powers, for there was at that time a growing concern about the potential abuse of those powers. 94 Cong. Rec. A3888 (June 14, 1948) (remarks of Cong. Loa). It was not intended to *expand* antitrust liability. Certainly, this court may not infer that Congress had intended to alter the significance of the *Keogh* and *Georgia* rulings when the legislative history specifically states that the relationship with antitrust laws shall not be altered. *See* H.R. Report, *supra*.

Moreover, it is clear that courts since Reed-Bulwinkle have consistently applied *Keogh* without recognition of any legislative alteration of the dictates of the Supreme Court. *See, e.g., McLain v. Real Estate Board*, 444 U.S. 232, 243 (1980); *Litton Systems, Inc. v. Amer. Tel. & Tel. Co.*, 700 F.2d 785, 820-21 (2d Cir. 1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *In re Wheat Rail Freight Rate Antitrust Litigation*, 1984-1 Trade Cas. (CCH) ¶ 65,861 (N.D. Ill. 1984); *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trad Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,282 (S.D.N.Y. 1974).

Plaintiffs argue that two cases illustrate a post-Reed-Bulwinkle departure from *Keogh*. The earlier, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), concerns shipping, *not* motor carriers, and never mentions *Keogh*. The more recent, *Interstate Commerce Commission v. American Trucking Association, Inc.*, ____ U.S. ____, 104 S.Ct. 2458 (1984), specifically recognizes that antitrust immunity has limits. Under Reed-Bulwinkle and the more recent Motor Carrier Act, Pub..L. 96-296, 94 Stat. 793, rate bureaus must conform to specific guidelines in order to retain antitrust immunity. 49 U.S.C. § 10706(b)(3)(A), (B); *Interstate Commerce, supra* at 2461 n.1. In short, neither case supports a view that Congress has in any way detracted from the Supreme Court's instruction in *Keogh*.

III.

Plaintiffs' second position deserves careful address. The complaint specifically alleges that the defendants acted outside the scope of the NFTB agreement by "engaging in conduct that either was not or could not be approved by the ICC." [Complaint, ¶ 22.] The plaintiffs argue that this "broader conspiracy" places the defendants outside recognized antitrust immunity.

Justice Brandeis, writing for the court in *Keogh*, stated:

> [U]nder the Anti-Trust Act, a combination of carriers to fix reasonable and nondiscriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. . . . It does not, however, follow the Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed. . . .
>
> A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce. . . . If the conspiracy here complained of had resulted in rates which the Commission found to be illegal because unreasonably high or discriminatory, the full amount of the damages sustained, whatever their nature, would have been recoverable in such proceedings. . . .
>
> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

260 U.S. at 161-63. The Court further explained:

> This stringent rule prevails because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under § 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors.

Whatever the breadth of plaintiffs' allegations, the complaint essentially focuses on what plaintiffs claim are unjust and excessive rates. As the court in *Pinney Dock & Transport Co. v. Penn Central Corp.*, ____ F. Supp. ____, ____ (N.D. Ohio 1983) ("Pinney II"—on reconsideration), recognized, there are attendant complications with respect to a damage calculation which depends upon a hypothetical rate, since rate determinations are a matter for the ICC and not for the court. Although the plantiffs rely on *Pinney Dock* for the proposition that a "broader conspiracy" avoids *Keogh*, they cite the original opinion on motion to dismiss—not the later reconsideration motion. *Pinney Dock* 1983-2 Trade Cas. (CCH) ¶ 65,607 (N.D. Ohio 1983) ("Pinney I"). The later opinion of Judge Thomas clarifies two important points: 1) Pinney was claiming antitrust damage as a *competitor*—not a customer; and 2) "dismissal of the

plaintiffs claim [when a *customer*] would appear then to be the only alternative." *Pinney II*. *See Monticello Heights*, *supra* (dismissal of shipper complaint despite allegations not only of price-fixing, but also of monopolization through coercive and exclusionary conduct).

Finally, "prior ICC approval of a rate does not influence the *Keogh* rule." *See Monticello*, *supra*, and *Asbury Graphite, Inc. v. Dehyco Co.*, 1981-1 Trade Gas. (CCH) § 63,980 (N.D. Cal. 1980) (shipper antitrust actions dismissed without regard to whether or not the ICC had approved the rates).

Although palintiffs claim that some "larger conspiracy" like that recongized in *United States v. Bessemer and Lake Erie R.R. Co.*, 717 F.2d 593, 600 (D.C.D.C. 1983), would evade *Keogh*, *Bessemer* involved a criminal proceeding—precisely the kind already instituted and dropped without indictment and upon consent of the parties in the instant civil action.

IV.

In sum, this court is unpersuaded that plaintiffs have a right to maintain this suit. For these reasons, defendants' motion to dismiss is granted. Consequently, the remaining motions need not be addressed. The Clerk is directed to enter judgment dismissing the complaint.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: September 25, 1984

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.,
Plaintiff(s)

v. **CIV-84-158C**

NIAGARA FRONTIER TARIFF
BUREAU, INC., *et al.*,
Defendant(s)

SIR/MADAM: Take notice of an ORDER and a JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 25th day of September, 1984 and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 25th day of September, 1984.

Dated: Buffalo, New York
September 25, 1984

JOHN K. ADAMS, Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Douglas V. Rigler, Esq.
Donald L. Flexner, Esq.
Lauren D. Rachlin, Esq., Joseph E. Zdarsky

Howard J. Ross, Esq.
H. Laddie Montague, Esq.
Arnold Levin, Esq., Howard Sedran, Esq.
Richard Greenfield, Esq.
Bryce Rea, Jr., Esq.
Peter A. Green, Esq., Charles L. Freed, Esq.
Peter D. Standish, Esq.
J. Edmund deCastro, Jr., Esq.
Robert B. Conklin, Esq.
James M. Kieffer, Esq., Brian P. Fitzgerald, Esq.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D COMPANY and
BIG D BUILDING SUPPLY CORP.

V. **Civ-84-158C**

NIAGARA FRONTIER TARIFF
BUREAU, INC., *et al.*

HONORABLE JUDGE T. CURTIN

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

It Is Ordered and Adjudged: That pursuant to a Decision & Order entered September 25, 1984, the complaint is dismissed.

John K. Adams, Clerk
Buffalo, New York
Sept. 25, 1984

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SQUARE D CO.

Plaintiff,

-AGAINST- **CIV 84-158**

NIAGARA FRONTIER TARIFF BUREAU, *et al.*,

Defendants.

Proceedings:
Oral argument.

Before:
HON JOHN T. CURTIN, USDJ.

Location:
U.S. DISTRICT COURT
Buffalo, New York

Date:
June 19, 1984.

Reporter:
EUGENE R. BECKSTEIN

Appearances:
DOUGLAS V. RIGLER, ESQ.
MICHAEL FISCHER, ESQ.
JOSEPH ZDARSKY
Appearing for Square D Co.

DONALD FLEXNER, ESQ.,
ROBERT B. CONKLIN, ESQ.
Appearing for Dominion-Consolidated.

WILLIAM L. RIETH, ESQ.
JOEL B. HARRIS, ESQ.
Appearing for T.N.T. Canada

JAMES M. KIEFFER, ESQ.
CHARLES L. FREED, ESQ.
Appearing for ICT International Carriers.

SANFORD M. LITVACK, ESQ.
BRYCE REA, ESQ.
CLARK E. WALTER, ESQ.
MARIA T. GALENO, ESQ.
Appearing for Niagara Frontier
Tarrif Bureau.

THOMAS H. YANCEY, ESQ.
Appearing for Husband Route Canada.

REID P. F. STUNTZ, ESQ.
Appearing for Laidlaw Transport.

JOHN W. BRYANT, ESQ.
J. EDMUND deCASTRO, ESQ.
Appearing for Kingsway Transport.

LESTER M. BRIDGEMAN, ESQ.
NORMAN E. S. GREENE, ESQ.
Appearing for Inter City Truck Line.

SALVATORE MARTOCHE, ESQ.
United States Attorney,
By: SONIA C. JAIPAUL, ESQ.
Assistant United States Attorney,
Appearing for the Government.

The Court:
Well, why don't I see what Mr. Flexner has to say about this, and then we'll have you back Mr. Rigler. Keep this in focus. Mr. Flexner, what do you say about what Mr. Rigler just pointed out to us?

Mr. Flexner:

Your Honor, let me start with the conduct issue. Mr. Rigler comes before the Court and says, your Honor, this is a serious case because the conduct at issue is outside the scope of the statutory immunity, and that is what the complaint says and that is what we concede for purposes of this motion. We concede that. It is irrelevant, your Honor. What is relevant in the two complaints that are before the Court are the damage and injury sections. If you look at paragraph 22, in the Big D Supply Corporation complaint, what you see is the following allegations. By reason of the defendants and their co-conspirators illegal conduct, plaintiff and the members of the class it represents were compelled to pay and have paid substantially higher prices for the carriage of cargo than they would have paid absent defendants' combination and conspiracy. That is what Keohoe is all about. That is an attack on the rates that were charged by the defendants. The damages sought are the differences between the filed and published rates, and some hypothetical rate that the plaintiffs claim would have existed if there were not an interference with the right of independent action, which the plaintiff says was so serious as to deprive these defendants of their antitrust immunity.